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Introduction

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INTRODUCTION

JOEL K. GOLDSTEIN*

The Richard J. Childress Memorial Lecture has become the highpoint of the academic year at Saint Louis University School of Law. The Lecture, which honors the memory of a long-time dean and member of our faculty,¹ has been delivered each fall beginning in 2000 by a distinguished scholar on an important legal subject. Dean Jeffrey Lewis's vision of the program was not simply to produce a typical speech on an academic topic, but to commission a preeminent scholar to write a substantial article on a critical issue and to invite responses from other thoughtful scholars and activists. Our *Law Journal* annually publishes the article that grows out of the Childress Lecture and the comments and responses it provokes. The first two such programs and volumes provided stimulating articles by distinguished academics on important legal issues.² This year's contributions by Professor Thomas W. Merrill on *The Making of the Second Rehnquist Court: A Preliminary Analysis*³ and by the respondents again far exceed the ambitious standard set for the Lecture and its accompanying issue of the *Law Journal*.

This volume's significance comes, in part, from its subject. The Rehnquist Court, now in its seventeenth year, takes its name, of course, from its Chief Justice, William H. Rehnquist. Any "Court" is important given the role of the Supreme Court in American government; this Court, however, merits special attention now for several reasons. To the extent it is fair to identify the Rehnquist Court with its Chief Justice, it is one of our history's longest running Courts. Only John Marshall, Roger Taney, Melville Fuller and Warren Burger served longer as Chief than has Chief Justice Rehnquist. Moreover, it has played an important role in reversing, checking, and

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1. See John E. Dunsford, *Dick Childress as a Teacher*, 21 ST. LOUIS U. L.J. 1 (1977); Vincent C. Immel, *Dick Childress as Dean*, 21 ST. LOUIS U. L.J. 3 (1977); Hon. Joseph J. Simeone, *Richard J. Childress: His Impact on the Legal Community*, 21 ST. LOUIS U. L.J. 5 (1977); Msgr. John A. Shocklee, *Richard J. Childress: His Commitment to Human Rights*, 21 ST. LOUIS U. L.J. 10 (1977).

2. See Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303 (2001); Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293 (2002).

3. Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003).

challenging constitutional doctrine fashioned over the prior sixty plus years, a period spanning the Stone, Vinson, Warren and Burger Courts. In recent years, the Rehnquist Court repeatedly has asserted its status as supreme constitutional interpreter, and has assumed some unprecedented roles, deciding *Bush v. Gore*⁴ among them. Finally, rumors abound that the Chief Justice may soon step down.

The presence of Professor Merrill as this volume's primary author also gives it great lustre. Professor Merrill is, of course, the John Paul Stevens Professor of Law at Northwestern University School of Law. There, and elsewhere, he has had a range of rich professional experiences, as law clerk to Judge David Bazelon and Justice Harry Blackmun, and as Deputy Solicitor General during the Reagan and first Bush administrations. His scholarly writings have an uncommon breadth. In addition to the following article, he has published fourteen major articles and a book in just the last five years (not to mention numerous other leading works since the mid-1980s). His scholarly interests include administrative law,⁵ constitutional law,⁶ property,⁷ regulated industries,⁸ environmental law⁹ and federal courts,¹⁰ among other areas. What is distinctive about Professor Merrill is not simply the volume or range of his scholarship—though both are astounding—but its unique high quality. He

4. 531 U.S. 98 (2000).

5. See, e.g., Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807 (2002); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002).

6. See, e.g., Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000); Thomas W. Merrill, *Beyond the Independent Counsel: Evaluating the Options*, 43 ST. LOUIS U. L.J. 1047 (1999); Thomas W. Merrill, *The Constitution and the Cathedral: Prohibiting, Purchasing, and Possibly Condemning Tobacco Advertising*, 93 NW. U. L. REV. 1143 (1999); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000).

7. See, e.g., DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* (2002); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001).

8. See, e.g., William J. Baumol & Thomas W. Merrill, *Does the Constitution Require that We Kill the Competitive Goose?: Pricing Local Phone Services to Rivals*, 73 N.Y.U. L. REV. (1998); Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998).

9. See, e.g., Thomas W. Merrill, *Explaining Market Mechanisms*, U. ILL. L. REV. 275 (2000) (contributing to a symposium entitled *Innovations in Environmental Policy*); Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931 (1997).

10. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225; Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993).

manages to be creative yet careful in his claims, thought-provoking yet intellectually honest, all of which have earned him an uncommon level of respect from academicians across political and jurisprudential spectrums.

This contribution is no exception. Professor Merrill's article is rich and elegant, and no quick summary can do it justice. Reading it is its own reward. In essence, though, Professor Merrill suggests that there have been not one, but two Rehnquist Courts. The first ran from October 1986 to July 1994; the second, since then. The first Rehnquist Court focused on contentious social issues, the second on structural questions relating to constitutional federalism. The change in emphasis is due in large part, Professor Merrill suggests, to a change in personnel. The first Rehnquist Court experienced regular personnel changes as two-thirds of its members retired. The second Rehnquist Court has had no turnover in eight years. The stability of the Court has enhanced the ability of its members to predict likely outcomes of cases. This context helps to explain some of the strategic decisions various Justices have made and helps to explain some of the differences in doctrine, emphasis and behavior that Professor Merrill identifies in the two Rehnquist Courts.

The most interesting strategic behavior, and that which has most influenced the differing approaches of the two Courts, is that of Justice Scalia. During the second Rehnquist Court, Professor Merrill speculates that Justice Scalia has subordinated issues of primary interest to him to join the Chief Justice, and Justices O'Connor, Kennedy and Thomas to form a conservative majority in federalism cases—an area to which he has evidenced less commitment. Professor Merrill suggests that Justice Scalia may have made this strategic shift to gain capital within the Court, particularly with the Chief Justice and the others in the five-Justice bloc, and because it was an area in which the conservative bloc could reliably hold. Professor Merrill also believes that, concurrently with Justice Scalia's internal strategic shift, Justices O'Connor and Kennedy may have made a move in response to external forces, such as public opinion and reputational concerns. They have been less anxious to grant certiorari on hot button social issues on the Court's docket. Justice Scalia's decision made the federalism focus of the second Rehnquist Court possible; his decision, along with those of Justices O'Connor and Kennedy, resulted in the reduced saliency of controversial social issues. According to Professor Merrill, Justice Scalia may also have driven certain other changes in the Court's behavior, such as the reduced annual docket. Lastly, Professor Merrill suggests that the Court's stable membership and the success of the federalism five have fostered bonds of cooperation that may radiate into other areas.

Professor Merrill's thesis is innovative and surprising. It forces us to think about this Court and judicial behavior in new and different ways. It is hard to imagine that anyone interested in constitutional law and judicial behavior would not be moved immediately to stop reading this *Introduction* and to turn

the pages quickly to begin reading Professor Merrill's Article. For those willing to defer that treat for a moment more, however, there is a further reason to celebrate Professor Merrill's contribution here.

What is significant about Professor Merrill's Childress Lecture is not simply his novel argument, but also his methodology. Rather than simply deploying the conventional approaches of constitutional law, Professor Merrill appropriates tools of political scientists to analyze the Court during the years William Rehnquist has been its Chief. In so doing, he helps to initiate a dialogue between two of the academic disciplines—law and political science—that study and illuminate judicial behavior. Starting this conversation is no small contribution. Living in an age of specialization, as we do, has its drawbacks. Keeping up becomes more daunting as academic disciplines become more refined and scholarship proliferates. Scholars often find themselves narrowing their focus, retreating first into their own disciplines and then into subspecialties within their area. Even those with cross-cutting interests find themselves struggling to keep current with the good literature in their own field, much less that in cognate areas. Academic literature becomes inaccessible to most and often obsessed with internal debates of interest only to a few immersed in the discipline. A certain tunnel vision results and we often find ourselves mistaking the small slice we see for the whole scene.

Against this backdrop, Professor Merrill's article represents a welcome effort to bridge the divide and chart a new course for constitutional and judicial scholarship, one which engages law and political science scholars in a common effort drawing upon the insights of both communities. The interdisciplinary conversation that his Article has initiated promises to enrich our understanding of law and the judiciary.

The essays by the distinguished commentators suggest that Professor Merrill has provoked a vigorous discussion regarding both his substantive claims and the methodology he adopts. Like all stimulating ideas, his have not convinced all who have heard them. Yet, as with other provocative pieces, his Article has spurred creativity in those he has persuaded and those harboring doubts. Like Professor Merrill's Article, the Essays are nuanced and resist one sentence summations. Subject to that disclaimer, the headlines are as follows:

Several papers principally address Professor Merrill's argument on the merits. Collectively, they raise the following principal objections: (1) some contest the claim of two Rehnquist Courts; (2) some contest the characterization of Justice Scalia's conduct as strategic; and (3) some highlight other similarities or differences.

Professor Erwin Chemerinsky, while accepting many of Professor Merrill's claims, suggests three qualifications: (a) the second Rehnquist Court has demonstrated far less deference to elected branches of government; (b) areas of consistency exist between the two Rehnquist Courts, that is, both Courts narrow civil rights law and rule against criminal defendants; and (c)

while the second Rehnquist Court demonstrates greater interest in federalism issues, it has not abandoned its social agenda. Similarly, Professor Richard Lazarus argues that there has been one Rehnquist Court that has retained a consistent social agenda, and he contests Professor Merrill's speculation regarding the role of Justice Scalia as the architect of change. Professor John O. McGinnis argues that the first Rehnquist Court tried to promote federalism and that the second has not abandoned social issues. Like some others, he finds the portrayal of Justice Scalia as a strategic actor implausible; rather, he sees him as committed to a methodology of originalism which causes him to defer to federal action within its enumerated powers and to restrain it otherwise. Professor Bradford Clark connects the Court's federalism cases to its separation of powers jurisprudence. He argues that Justice Scalia has not acted in a strategic manner, but rather has a long-standing interest in federalism cases that dovetails with his separation of powers jurisprudence. Finally, Professor Neal Devins largely accepts the two Rehnquist Court thesis, but thinks the causal explanation is simpler than Professor Merrill suggests. It was not Justice Scalia's internal strategic calculations that were significant, but rather the external strategic calculations of Justices O'Connor and Kennedy that have been decisive. They were never that attached to the social agenda of the first Court, which met with little success. Attuned to popular opinion and, to some extent, congressional signals, they retreated from hot button issues—which had proved controversial—to a federalism agenda—which did not threaten most people's blood pressure.

Several contributors assess Professor Merrill's argument from different angles. Professor Alan Howard focuses on an area of his particular expertise, the First Amendment, to test Professor Merrill's claims on a field he essentially chose not to cover. Professor Howard analyzes the 108 free speeches cases the Rehnquist Court has decided and found that "*continuity*—not *change*—best describes the Court's free speech jurisprudence throughout the period of the Rehnquist Court."¹¹ He suggests that this finding impeaches Professor Merrill's claims regarding two Rehnquist Courts and his causal explanation for the change.

Professor Jim Chen tests Professor Merrill's claims about the role of stability in Court personnel by comparing the second Rehnquist Court to other eras in which the Court's membership was unchanged. Professor Chen finds that past Courts with both changing and stable memberships have brought sweeping doctrinal change. Ultimately, based on a variety of empirical measures he describes, he concludes that upheaval, not stability, inspires doctrinal creativity.

11. Alan J. Howard, *Continuity on the Court: The Rehnquist Court's Free Speech Cases*, 47 ST. LOUIS U. L.J. 835 (2003).

Finally, Professors Tracey E. George and Albert H. Yoon examine the relationship between the two Rehnquist Courts and the United States Courts of Appeals in order to add to and enrich Professor Merrill's model. They find that the second Rehnquist Court reversed lower courts more often than had its predecessor and that the reversal rates of conservative, as well as liberal, decisions rose.

Several contributors comment primarily on Professor Merrill's methodology. Professors Lee Epstein, Jack Knight and Andrew D. Martin applaud Professor Merrill's appropriation of political science methods and models that they have played a significant role in developing. They suggest, however, that:

he—and indeed, other legal academics—might make even better use of our theories and technologies by gaining a firmer grasp on the overall “political science” project, developing a more nuanced understanding of our leading theoretical accounts, and assessing the implications of those accounts against more reliable and valid data via more appropriate methodology.¹²

Their Article sketches some of the central tenets of their work.

Professor H. W. Perry, another political scientist, also welcomes Professor Merrill's use of political science models. Yet he cautions against taking political science too seriously and against focusing only on what public law scholarship contributes while ignoring other areas. In particular, he suggests that studies of judicial decision making, by lawyers and political scientists, would benefit from greater understanding of cognitive psychology.

Professor Eric Claeys is far less sanguine about the virtues of using political science empirical models to study the work of the Supreme Court. He argues that “idea-based studies,” which focus on evaluating what courts say, offer greater insight than empirical theories that alone are incomplete. He believes that “living Constitution” theory offers greater insight into contemporary judicial decision making.

At the end of the day, in my view, at least, a robust core of Professor Merrill's thesis survives this gauntlet of critics from law and political science faculties. Since 1994, the Rehnquist Court has emphasized federalism issues in a way that it did not during its first eight years and has revised doctrine that had stood for much of a century. Controversial social issues that dominated the work of the first Rehnquist Court, though not always with the result that the Chief Justice preferred, did not disappear but were mostly brought down from the marquis. The change in personnel, largely the indirect replacement of Justice White by Justice Thomas, was critical in fashioning a potential federalist bloc of five. The stability of the Court's membership, particularly of that bloc, made the federalism decisions beginning with *United States v.*

12. Lee Epstein et al., *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L.J. 783 (2003).

*Lopez*¹³ possible. Justice Scalia's relatively passive participation in this development suggests that Professor Merrill's strategic theory may be correct. Moreover, the interdisciplinary conversation which Professor Merrill has sparked, and which the distinguished contributors have joined, should enhance the understanding that lawyers, political scientists and the public have of the Constitution, the judiciary and the Rehnquist Court.

All of which made this year's Childress Lecture a seminal event and makes this volume of the *Law Journal* a rich addition to scholarship on the Supreme Court in general, and the two Rehnquist Courts in particular.

13. 514 U.S. 549 (1995).

